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No. 89-1217

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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I. THE UNIONS REWRITE *ELLIS* AND IGNORE CONFLICTING VIEWS ON THE UNIT ISSUE

Respondents' Brief in Opposition ("Opposition") is more significant for what it omits than what it says. Its restatement of the Questions Presented describes the test for chargeable costs under *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), as whether expenses "were 'normally or reasonably employed to implement or effectuate the duties of' the exclusive representative." Opposition at i. If *Ellis*, 466 U.S. at 448 (emphasis added), is quoted in full, which respondent unions never do, the standard is far narrower:

> the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative *of the employees in dealing with the employer on labor-management issues*. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering *a* collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative *of the employees in the bargaining unit*.

Accord Austin v. Michigan State Chamber of Commerce, 58 U.S.L.W. 4371, 4375 (U.S. Mar. 27, 1990) (No. 88-1569).

Two other omissions show that petitioners are not "plainly wrong" in reading that test as requiring "a unit-by-unit breakdown," as the Opposition at 13 says. The unions never mention the dissenting opinion of Circuit Judge Merritt, who agreed that *Ellis* "establishes the principle that the union expenses charged * * * must relate closely to the activities of the bargaining unit of the

dissenting members." App. A at 15a.[1] And the unions ignore *Crawford v. Air Line Pilots*, 870 F.2d 155 (4th Cir. 1989) (argued en banc Oct. 3, 1989), although it supports them on the unit issue. That omission is revealing because, like Judge Merritt's opinion, the grant of rehearing in *Crawford* demonstrates that the issue is an important one on which there are divergent views in the lower courts.

The unions also rewrite the rulings of *Ellis* on specific activities. They say that it affirmed that costs of all portions of the union's magazine devoted to non-political subjects, including activities in other units, can be charged to dissenters, except those reporting on organizing and certain litigation. Opposition at 13-14. *Ellis*, 466 U.S. at 451, *actually* held that, "[i]f the union cannot spend dissenters' funds for a particular activity, it has no justification for spending their funds for writing about that activity." Organizing and litigation not involving the dissenters' bargaining unit were simply examples of nonchargeable activities, *id.* at 451 n.11, which include *all* activities excluded by the general test.[2]

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[1]A critic of *Ellis* concurs that its formula "inquires whether a particular expenditure was authorized by a policy * * * of requiring nonmember employee support only for specific collective bargaining services rendered on behalf of the payor or her unit." Friesen, *The Costs of "Fee Speech"—Restrictions on the Use of Union Dues to Fund New Organizing*, 15 Hastings Const. L.Q. 603, 624 (1988); *see also The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 196-98 (1977) (same limit required by *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), and *Machinists v. Street*, 367 U.S. 740 (1961)).

[2]The topics listed by *Ellis*, 466 U.S. at 450, were not necessarily held chargeable, as the Opposition at 13-14 implies. They include articles about "proposed or recently enacted legislation," which were not chargeable under the union's rebate policy, *Ellis v. Railway Clerks*, 685 F.2d 1065, 1069 (9th Cir. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984). The Court *adopted* that limit. 466 U.S. at 450-51.

Similarly, the rulings in *Ellis* as to social activities and conventions do not support the unions' contention that activities which have no direct relationship to statutory representation of the nonmembers' bargaining unit may be charged to them, so long as some employment-related interest of employees or former employees is affected somewhere, even where there is no public-sector bargaining. As is typical in the railway and airline industries, but not true here, in *Ellis* the national union was itself the exclusive representative. *Compare* Brief for Respondents at 27, *Ellis* (No. 82-1150), *and Crawford*, 870 F.2d at 157, *with* App. A at 2a. Thus, the social activities and conventions in *Ellis*, 446 U.S. at 448-50, were directly related to representation of more than one unit, including the objectors'. In this case, the charges at issue are not costs of bargaining-related services provided to more than one unit, chargeable proportionally to dissenters in all of those units, but charges for services provided *only* to other units.

II. THE UNIONS IGNORE THE SERIOUS FIRST-AMENDMENT IMPLICATIONS OF THIS CASE

Most striking in the unions' brief is the silence as to how the decision below meets first-amendment scrutiny. Indeed, the first amendment appears only in a footnote. First-amendment concerns are deprecated as irrelevant, because "*Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977),] acknowledges that a constitutionally permissible agency fee arrangement necessarily implicates important First Amendment interests," and *Ellis* "approved the chargeability of activities that 'have direct communicative content and involve the expression of ideas.'" Opposition at 19 n.10 (quoting *Ellis*, 466 U.S. at 456). Yet *Abood* and *Ellis* do not hold first-amendment analysis unnecessary. To the contrary, *Abood* established that strict scrutiny is required in determining chargeability, and *Ellis* applied it.

The part of *Abood* the unions cite held the agency shop constitutional only insofar as a bargaining agent carries out its duties of "negotiating and administering a collective-bargaining agreement" and adjusting grievances "within the relevant unit." 431 U.S. at 221-22, 232. But when service fees are spent to advance political or ideological causes in other fora, the relevant principles are those applied in the first-amendment cases relied on in the *next* part of *Abood*, 431 U.S. at 232-36, such as *Elrod v. Burns*, 427 U.S. 347, 362-63 (1976), and *Buckley v. Valeo*, 424 U.S. 1, 25, 64-65 (1976). The most basic such principle is strict scrutiny. *See Teachers Local 1 v. Hudson*, 475 U.S. 292, 302-03 & nn.11-12 (1986).

Ellis, 466 U.S. at 456, implicitly applied strict scrutiny to all disputed activities which "have direct communicative content and involve the expression of ideas": conventions, publications, organizing, and litigation. The conventions and portions of publications held chargeable met the stricter part of the *Ellis* test, that to be chargeable costs must be "necessarily * * * incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues," *id.* at 448. The Court found that conventions "such as those at issue here are * * * *essential* to the union's discharge of its duties as bargaining agent"; and, that the "union *must* have a channel for communicating with the employees" about "those activities it can charge them for doing." *Id.* at 448-51 (emphasis added).

The Ninth Circuit had ruled that organizing and all litigation met the less exacting part of the *Ellis* test, *i.e.*, are "reasonably incurred for the purpose of performing" statutory duties in the objectors' bargaining unit, since they "strengthened the union as a whole" and "ultimately benefited * * * collective-bargaining efforts" in the unit. *Id.* at 441, 448. Nonetheless, because organizing and litigation

outside the unit are not "necessarily * * * incurred" for bargaining in it, this Court held them not chargeable. *Id.* at 451-53. The *only* activity found chargeable on the ground that it met the broader "reasonably incurred" test was social activities, which have no inherent communicative content. *Id.* at 449-50, 456.

All activities at issue here, even as the unions mischaracterize them, have significant "direct communicative content and involve the expression of ideas," *id.* at 456. Thus, those activities are not chargeable unless *necessary* to bargaining in the nonmembers' unit. Indeed, lobbying and ballot proposition campaigns are "at the heart of the First Amendment's protection." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978); *see Meyer v. Grant*, 108 S. Ct. 1886, 1895 (1988). So too are many of the public relations and other "general expenses" at issue, because, as Judge Merritt pointed out, they "are connected with political positions and philosophies with which the dissenters disagree." App. A at 15a-16a (dissenting).

To avoid first-amendment analysis of the bargaining-unit issue, the unions treat it as a discrete question. It is not. As Judge Merritt recognized, the *only* expenses at issue "which directly relate to the Ferris College bargaining unit's activities are the costs of preparing for a public employee strike which * * * would have been illegal if carried out." *Id.* at 16a. Thus, the issue is not just the chargeability of bargaining activities in other units, but also whether nonmembers must subsidize lobbying, ballot campaigns, and other ideological activities that involve their unit only indirectly or not at all.[3]

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[3]Like the majority below, the unions never claim that the "funding for public education" for which they lobbied and campaigned was for higher education in general, much less for Ferris State College. *See* Petition at 14 n.6.

Moreover, strict scrutiny applies even to bargaining-related activities in other units held chargeable below. They include litigation, *in direct conflict* with *Ellis*, 466 U.S. at 453. App. B at 55a-57a, 80a.[4] Even non-unit bargaining is petitioning of government on subjects other than *the objectors'* terms and conditions of employment.

III. THIS IS THE FIRST CASE TO REACH THE COURT WITH THE RECORD NEEDED TO ANSWER THE QUESTIONS POSED IN *ABOOD*

The unions argue against certiorari on the important question of the chargeability of lobbying and political action, because the Court denied plenary review in *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), *Knight v. Minnesota Community College Faculty Ass'n*, 571 F. Supp. 1 (D. Minn. 1982) (3-judge court), *aff'd mem.*, 460 U.S. 1048 (1983), *Champion v. California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985), and *In re Boonton Bd. of Educ. (Kramer)*, 99 N.J. 523, 494 A.2d 279 (1985), *cert. denied*, 475 U.S. 1072 (1986). However, that issue was not involved in *Knight, see* 571 F. Supp. at 6, and was not presented in the other cases in the same posture as here.

Whether activities "properly fall under the definition of collective bargaining" are "difficult constitutional questions" under the first amendment which can only be decided with concrete evidence of their precise nature. *Abood*, 431 U.S. at 236-37. The record was insufficiently

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[4] The district court speculated that it would be unduly burdensome to account for litigation and other direct expenses by unit. App. B at 57a. The testimony belies that speculation. Litigation expenses *were already kept by unit*, without burden. JA at 155, 174-77. And, the NEA's accounting manager admitted that field personnel could designate the units served on the timesheets indicating daily activities kept by all of its employees. JA at 183-87.

developed in *Robinson*, *Champion*, and *Kramer*. The only evidence in *Robinson* as to lobbying, which the district court held nonchargeable on motions for preliminary injunctions, was in affidavit form. *See Robinson v. New Jersey*, 547 F. Supp. 1297, 1301-02, 1313, 1316-17 (1982), *further proceedings sub nom. Olsen v. Communications Workers*, 559 F. Supp. 754, 769-70, *further proceedings sub nom. Robinson v. New Jersey*, 565 F. Supp. 942, 944 (D.N.J. 1983), *rev'd*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985). The record also was limited in *Champion*, which was decided on appeal from denial of a preliminary injunction. *See* 738 F.2d at 1085-86. There was no record of expenses at all in *Kramer*, because determination of the activities on which nonmembers' fees could be spent was outside the jurisdiction of the agency in which the case was filed. *See* 99 N.J. at 536 & n.1, 494 A.2d at 285-86 & n.1. Here, in contrast, a comprehensive record as to lobbying and political action was developed at trial through the testimony of several witnesses and many exhibits. *See* App. B at 19a, 30a-33a, 39a-43a.

Distorting the record by selective quotation from the opinions below, the unions assert that lobbying and other political action were held chargeable only "on one specific subject—securing funds for public education." Opposition at 15, 17. On first-amendment issues, this Court does not defer to findings of lower courts, but examines the entire record anew. *Rankin v. McPherson*, 483 U.S. 378, 384-86 & n.9 (1987); *see Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 173-76 & n.5 (1976) (independently determining what properly constitutes "negotiating"). Here, the lobbying concerned not just appropriations for public education, but, *inter alia*,

taxes,[5] statutory retirement benefits, proposed abolition of the U.S. Department of Education, and tuition tax credits. *See* Exs. 594 at 9-17 (JA 159, 528-36), 612 (JA 163, 165, 663), GGGG at 40-41 (JA 366, 654-55). Similarly, the other political action held chargeable was not just "campaigns to raise funds for public education," Opposition at 17. It also was efforts "on ballot propositions involving utility rates and a nuclear weapons freeze," as the panel majority conceded, App. A at 10a, and "in state and local elections on behalf of candidates," as Judge Merritt recognized, *id.* at 13a (dissenting). *See, e.g.*, Exs. 162 (JA 301, 448), 164 (JA 326, 450), 167 (JA 304-05, 463), 168 (JA 330, 471), 170 (JA 305-06, 479), 594 at 18-23 (JA 159, 537-42), 612 (JA 163, 165, 663).

Moreover, in denying conflict between the majority's holding that the lobbying and other political action at issue is "directly related" to bargaining, App. A at 7a-9a, and *Pickering v. Board of Education*, 391 U.S. 563 (1968), the unions show it. They distinguish *Pickering*, because the public statements there concerned "a school district's allocation of funds," while the lobbying and political action here concerned "the allocation of funds for education" or the "level of funding of education generally." Opposition at 17-18.[6] However, the legislature's allocation of funds among educational purposes, or between education and other governmental functions, is *more* remote from employer-employee relations than the immediate employ-

[5] Taxation is not a "budgetary [or] appropriations" decision that "might be seen as an integral part of the bargaining process," *Abood*, 431 U.S. at 236 (*dicta*). Like the election of "pro-labor political candidates," *Ellis*, 466 U.S. at 453, who make those decisions, taxation relates only indirectly and contingently to bargaining.

[6] In fact, the statements in *Pickering* also concerned the district's overall level of funding. *See* 391 U.S. at 565-66.

er's allocation of funds within a particular bargaining unit. Thus, the holding of *Pickering*, 391 U.S. at 571-74, that the speech there was insufficiently related to employment to be a matter of employer-employee relations, rather than "debate on matters of public importance" fully protected by the first amendment, applies *more strongly* here.

IV. THE ISSUE OF STRIKE PREPARATIONS IS NOT *SUI GENERIS* AND IS PRESENTED HERE

The unions make two disingenuous arguments against review of the chargeability of the local union's costs "in publicizing, preparing for and threatening a strike that would be illegal under Michigan law." App. A at 11a.

First, they say "the issue is *sui generis*." Opposition at 20. That no other reported decision has addressed the problem yet does not make it unique. Agency-shop agreements exist in hundreds of bargaining units represented by the unions' affiliates in Michigan. *See* Ex. 73 at 3-4 (JA 439-40, Culver Tr. 108-09). At least thirteen locals conducted strikes in the year at issue. *See* Ex. 612, Oct. 26, 1981, at 12 (JA 163, 165, 710). A strike actually occurs in "only one out of every seven or eight" situations in which a local makes "outward preparations for a possible strike," App. B at 29a, which means that nonmembers' fees probably were used to threaten illegal strikes in almost 100 instances that year. Moreover, the misuse of compulsory fees for that purpose undoubtedly is not limited to Michigan. At least seventeen other states, including two in the Sixth Circuit, and the District of Columbia authorize agency shops, but prohibit strikes, for public employees.[7]

[7] *See, e.g.*, Ky. Rev. Stat. Ann. §§ 345.050(1)(c), .130 (Michie 1983) (firemen); N.Y. Civ. Serv. Law §§ 208, subd. 3, 210 (McKinney 1983 & Supp. 1990) (all public employees); Ohio Rev. Code Ann. §§ 4117.09(C), .11(B)(5), .14(D) (Baldwin 1983) (essential employees).

Second, the unions deny that the issue is presented, because they claim that the disputed money was not spent solely to threaten or prepare for a strike. Opposition at 21-22. However, the only other purposes the expenditures served were providing a meeting place for members during negotiations and "informing the public of the issues involved in an attempt to bring public pressure to bear on the employer." App. B at 30a. Those purposes were not "plainly chargeable" and "beyond reproach," as the Opposition at 21 asserts. A temporary *strike* headquarters was not needed to hold union meetings; and, public pressure was not significant to the negotiations, because Ferris does not derive funds from the local community, but from tuition and legislative appropriations, *see* JA at 287-88, 290; Ex. 29 at 10 (JA 353, 426). Even assuming that a strike was not intended,[8] the only real purpose for the "crisis center" and public information activities was to make the threat of a strike credible. Moreover, even where strikes are legal, creating a favorable climate of public sympathy and support for the union is "not 'reasonably necessary . . . for the proper effectuation' of collective bargaining." *Beck v. Communications Workers*, 776 F.2d 1187, 1211 n.32 (1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grounds*, 487 U.S. 735 (1988).

V. CONCLUSION

The petition should be granted as to all questions.

Respectfully submitted,

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[8] That assumption is contrary to the documentary evidence. *See* Exs. 29 (JA 353, 419), 33 (JA 413, 415, 429), 627 (JA 385, 601).